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OFFICE OF SECRETARY

March 17, 1997

William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M St., NW
Washington, D.C. 20554

Re: CC Docket No. 96-115

Dear Mr. Caton:

Attached is the original, plus 4 copies, of Sprint Corp.'s Comments in the above-captioned proceeding. We have also provided Janice Myles of the Common Carrier Bureau with this filing on diskette in WordPerfect 5.1 format.

Sincerely,

Norina Moy
Director, Federal Regulatory
Policy and Coordination

cc: Janice Myles

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAR 17 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of the Telecommunica-)
tions Act of 1996;)

CC Docket No. 96-115

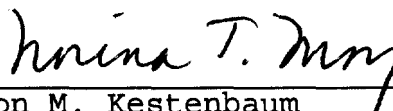
Telecommunications Carriers' Use of)
Customer Proprietary Network Informa-)
tion and Other Customer Information)

COMMENTS

Sprint Corporation hereby respectfully submits its comments in the above-captioned proceeding in response to questions posed by the Common Carrier Bureau, set forth in the Public Notice released February 20, 1997 (DA 97-385). Sprint's responses to questions regarding the relationship between Section 222 and Section 272 are attached.

Respectfully submitted,

SPRINT CORPORATION



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March 17, 1997

I. Interplay Between Section 222 and Section 271

A. Using, Disclosing, and Permitting Access to CPNI

1. Does the requirement in section 272(c)(1) that a BOC may not discriminate between its section 272 "affiliate and any other entity in the provision or procurement of...services...and information..." mean that a BOC may use, disclose, or permit access to CPNI for or on behalf of that affiliate only if the CPNI is made available to all other entities? If not, what obligation does the nondiscrimination requirement of section 272(c)(1) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?

Yes, pursuant to section 272(c)(1), a BOC may use, disclose, or permit access to CPNI for or on behalf of its affiliate only if such CPNI is available to any unaffiliated entity at the same rates and on the same terms and conditions as apply to the BOC's section 272 affiliate. CPNI -- information which is obviously useful to the marketing and sales efforts of providers of both local and interexchange services -- is precisely the type of information which the section 272(c)(1) nondiscrimination safeguards were designed to address. Congress clearly recognized that allowing a BOC to provide information such as CPNI to its affiliate on preferential rates, terms or conditions would give the affiliate an unwarranted advantage.

Although a BOC may not discriminate in the use, disclosure or access to CPNI, in situations in which a customer has given his informed consent to disclose his CPNI only to specified parties, the BOC may only use, disclose or provide access to such CPNI to the specified parties. For example, if a BOC customer authorizes release of his CPNI only to Sprint Long Distance, the BOC may not release that customer's CPNI to any other party under the guise of providing nondiscriminatory access.

2. If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request" under section 222(c)(2), does the nondiscrimination requirement of section 272(c)(1) mandate that a BOC's section 272 affiliate be treated as a third party for which the BOC must have a customer's affirmative written request before disclosing CPNI to that affiliate?

Yes, to the extent that an affirmative written request is required, the BOC must obtain such request before it releases the customer's CPNI to either its affiliate or to any non-affiliated entity. To treat the BOC affiliate as anything other than a third party, subject to less stringent disclosure or informed consent standards, would render the section 272(c)(1) nondiscrimination requirement meaningless.

The Commission should, however, be cautious about adopting rules which allow disclosure of individual CPNI only upon affirmative written request. As the Commission recognized in its NPRM in this proceeding (§30), section 222(c)(1) simply requires telecommunications carriers to obtain "the approval of the customer" to use, disclose, or permit access to his CPNI. Had Congress intended to require affirmative written authorization for release of such information in all cases, it could and would have inserted such language in section 222(c)(1), as it did in section 222(c)(2). The fact that a less rigid standard is included in section 222(c)(1) implies that a telecommunications carrier is not required to obtain written authorization from a customer before his CPNI can be used or disclosed.¹

¹Sections 222(c)(1) and 222(c)(2) are not incompatible. Section 222(c)(2) may be read as a directive: that telecommunications carriers must disclose CPNI upon affirmative written request to

Footnote continued on next page

Requiring written CPNI disclosure permission carries with it the very real possibility that such permission will rarely be granted. Experience has shown that customers often ignore bill stuffers and even more often ignore bill stuffers which involve a written response. For example, Sprint's Local Division recently sent its customers in one of its regions a bill stuffer requesting written authorization to make their CPNI available to other parties. To date, only a very few customers have responded. The Commission should be aware that adoption of an affirmative written response standard may result in a situation in which almost no CPNI is available for release and use.

any person designated by the customer; that is, telecommunications carriers may not withhold CPNI from a third party if the customer authorizes release of his CPNI to that party. In contrast, Section 222(c)(1) does not require, but rather permits, CPNI disclosure for a customer who has approved such disclosure.

3. If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request" under section 222(c)(2), must carriers, including interexchange carriers and independent local exchange carriers (LECs), treat their affiliates and other intra-company operating units (such as those that originate interexchange telecommunications services in areas where the carriers provide telephone exchange service and exchange access) as third parties for which customers' affirmative written requests must be secured before CPNI can be disclosed? Must the answer to this question be the same as the answer to question 2?

No. It is not unreasonable to require the BOCs, but not independent LECs or IXC, to treat their affiliates as third parties for purposes of disclosing BOC customer CPNI. The difference in regulatory requirements is justified by the difference in market power exercised by the BOCs on one hand, and other telecommunications carriers on the other hand. Unlike independent telephone companies, whose local exchange territories tend to be dispersed and predominantly rural, and IXCs, which lack control over bottleneck local facilities, the BOCs control bottleneck facilities in large, contiguous territories with major urban centers. Such control gives the BOCs tremendous market power for which more stringent regulatory safeguards are warranted.

The Telecommunications Act of 1996 makes an explicit distinction between the BOCs and other telecommunications carriers in several crucial aspects. Most obviously, sections 271 and 272 apply only to the BOCs. It is clear that Congress recognized the difference in market power and intended to apply stricter nondiscrimination and market entry standards to the BOCs than apply to independent telephone companies, IXCs, or other telecommunications service providers.

The Commission has also long recognized the need for differing levels of regulatory scrutiny and safeguards for the BOCs as opposed to independent telephone companies or IXC's. For example, the Commission adopted more stringent Computer III CPNI rules for the BOCs than for AT&T, and declined to apply any CPNI rules to independent telephone companies other than GTE;² and more stringent non-accounting safeguards apply to the BOCs than to independent telephone companies.³

In situations where there is the greatest potential for competitive abuse -- that is, where the carrier has the greatest market power -- the Commission should err on the side of caution and adopt more stringent CPNI regulations (such as treating BOC affiliates as third parties for which written authorization is required before CPNI is disclosed) which minimize the opportunity for the carrier to discriminate in favor of its affiliates. Where the potential for abuse is less, less stringent CPNI requirements can be adopted.

²See *Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corp.*, 9 FCC Rcd 4922 (1994). In the Computer III proceeding, the Commission also concluded that because ITCs "lack the same potential as the BOCs to engage in anticompetitive conduct in the enhanced services marketplace," non-structural safeguards such as CEI and ONA would not be applied to any of the ITCs. See *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 2 FCC Rcd 3072, 3099 (para. 188) (1987).

³ See, generally, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking* released December 24, 1996, FCC 96-489.

B. Customer Approval

4. If sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must a BOC disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with its section 272 affiliate? If, for example, a BOC may disclose CPNI to its section 272 affiliate pursuant to a customer's oral approval or a customer's failure to request non-disclosure after receiving notice of an intent to disclose (i.e., opt-out approval), is the BOC required to disclose CPNI to unaffiliated entities upon the customer's approval pursuant to the same method?

Yes. If a BOC may release its customers' CPNI to its affiliate based upon customer approval (oral or opt-out⁴), it must apply the same customer approval standard to CPNI disclosure requests on behalf of unaffiliated entities. To allow the BOCs to require written authorization for non-affiliated entities and oral or opt-out authorization (assuming Sprint's recommendation against the opt-out alternative is rejected) for its affiliate would enable the BOC to engage in unreasonable discrimination in violation of section 272(c), and would give the BOC's affiliate an unwarranted advantage to the detriment of competition in the market(s) in which the affiliate provides service.

⁴ However, as Sprint explained in its June 26, 1996 Reply Comments in this proceeding (pp. 4-6), negative ballots, or the opt-out approach, cannot be considered customer approval.

5. If sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must each carrier, including interexchange carriers and independent LECs, disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with their affiliates and other intra-company operating units?

Yes. If the Commission concludes that oral or opt-out customer approval is allowed under sections 222(c)(1) and 222(c)(2), then all telecommunications carriers, including BOCs, independent telephone companies, and IXC's, should be allowed to seek CPNI disclosure approval under such standard. However, as discussed in response to Question 3, if the Commission concludes that written customer approval is required, it may classify the BOC affiliate as a third party for which written CPNI disclosure is required, while holding other telecommunications carriers and their affiliates to a less stringent standard.

6. Must a BOC that solicits customer approval, whether oral, written, or opt-out, on behalf of its section 272 affiliate also offer to solicit that approval on behalf of unaffiliated entities? That is, must the BOC offer an "approval solicitation service" to unaffiliated entities, when it provides such a service for its section 272 affiliate? If so, what specific steps, if any, must a BOC take to ensure that any solicitation it makes to obtain customer approval does not favor its section 272 affiliate over unaffiliated entities? If the customer approves disclosure to both the BOC's section 272 affiliate and unaffiliated entities, must a BOC provide the customer's CPNI to the unaffiliated entities on the same rates, terms, and conditions (including service intervals) as it provides the CPNI to its section 272 affiliate?

Yes, a BOC must make the same CPNI approval solicitation service available to both its section 272 affiliate and non-affiliated entities. Just as CPNI constitutes information, so too does a CPNI approval solicitation service constitute "procurement of...information" for which the BOC may not discriminate pursuant to section 272(c)(1).

There may be significant advantages associated with having a BOC solicit CPNI disclosure authorization from its subscribers. For example, subscribers may be more willing to respond affirmatively to a CPNI authorization request which comes from their local telephone company than from some other entity with which the subscriber has no prior business relationship. The BOC may also be able to perform this service quite economically, since it has ready access to, and presumably can easily manipulate (e.g., sort geographically), its own subscriber lists. Allowing a section 272 affiliate to benefit from these advantages, while withholding such advantages from unaffiliated entities, would give the BOC affiliate an unwarranted competitive advantage.

To help ensure that a BOC's CPNI approval solicitation service does not discriminate in favor of the section 272 affiliate, all rates, terms and conditions associated with the offering of this service should be generally available, and information on such rates, terms and conditions should be publicly and readily available from the BOC. This safeguard is consistent with Section 272(b)(5), which requires that transactions between a BOC and its affiliate be conducted on an arm's length basis, be reduced to writing, and be available for public inspection.

BOCs providing a CPNI approval solicitation service should be required to word the solicitation in such a way that it could be used on behalf of either the BOC affiliate or an unaffiliated entity. For example, the solicitation could not be worded in such a way as to cause customers to unwittingly restrict access to their CPNI only to the BOC affiliate, as such wording would not constitute informed consent.

If the customer has approved disclosure of his CPNI to both the affiliate and unaffiliated entities, pursuant to section 272(c)(1), a BOC must indeed provide that information to all similarly situated entities, whether affiliated or non-affiliated, on the same rates, terms, and conditions (including service intervals). Any difference in price due to difference in circumstance must be cost-justified. For example, if the affiliate requests that the BOC solicit CPNI approval from a thousand customers, and an unaffiliated entity requests that the BOC solicit CPNI approval from a hundred customers, the BOC may charge dif-

ferent rates only if the rates are based on actual, demonstrable differences in the cost of providing the service.

C. Other Issues

7. If, under sections 222(c)(1), 222(c)(2), and 272(c)(1), a BOC must not discriminate between its section 272 affiliate and non-affiliates with regard to the use, disclosure, or the permission of access to CPNI, what is the meaning of section 272(g)(3), which exempts the activities described in 272(g)(1) and 272(g)(2) from the nondiscrimination obligations of section 272(c)(1)? What specific obligations with respect to the use, disclosure, and permission of access to CPNI do sections 222(c)(1) and 222(c)(2) impose on a BOC that is engaged in the activities described in sections 272(g)(1) and 272(g)(2)?

The services exempted from the nondiscrimination safeguards under Section 272(g)(3) involve the joint marketing and sale of BOC telephone exchange services by its affiliate, and the joint marketing and sale of an affiliate's in-region interLATA services by the BOC. Sections 222(c)(1) and 222(c)(2) govern the use, disclosure and provision of access to individual customer information. Sections 222 and 272 thus involve different activities and different types of customer contact.

For example, marketing and sales involve attempts to convince an end user to purchase a good or service from the telecommunications carrier. Securing CPNI disclosure approval, and disclosing or using CPNI for which disclosure approval has been obtained, do not involve a financial transaction in which the end user pays the carrier for a good or service. Furthermore, securing CPNI disclosure approval and disclosing or using such CPNI is unlikely to be a financially viable stand-alone activity for a telecommunications carrier; its viability depends upon the sale of telecommunications goods and services. And, marketing and sales activities can be performed by a party other than a BOC or its affiliate; for example, the BOC or its affiliate could easily subcontract its telemarketing efforts to an independent entity.

In contrast, CPNI can be obtained only from the incumbent carrier.

Given the different activities controlled by sections 222(c) and 272(g), section 272(g) should not be read as exempting BOCs or their section 272 affiliates from the nondiscrimination safeguards in sections 222(c) and 272(c)(1) as regards the use, disclosure, or permission of access to CPNI. Section 272(g) simply allows joint marketing by the BOC and its affiliate to the extent that such joint marketing does not rely upon CPNI.

8. To what extent is soliciting customer approval to use, disclose, or permit access to CPNI an activity described in section 272(g)? To the extent that a party claims that CPNI is essential for a BOC or section 272 affiliate to engage in any of the activities described in section 272(g), please describe in detail the basis for that position. To the extent that a party claims that CPNI is not essential for a BOC or section 272 affiliate to engage in those activities, please describe in detail the basis for that position.

Soliciting CPNI disclosure approval is not a section 272(g) activity. As discussed in response to Question 7, sections 222 and 272 involve different activities. It is possible to engage in marketing and sales activities without having access to CPNI.

CPNI is certainly a useful tool for implementing a successful sales and marketing campaign in that CPNI allows the carrier to target its efforts to potential customers who are most likely to purchase the carrier's services at all or in the quantities most preferred by the carrier. Sprint believes that if they can obtain the customer's disclosure authorization, it is a virtual certainty that the BOCs and their affiliates will rely upon CPNI to develop their joint marketing and sales activities.

Nonetheless, it is inevitable that some telecommunications service providers will elect to or be forced to rely upon aggregate customer information, subscriber list information, or information obtained from sources other than the incumbent LEC in developing and implementing their sales and marketing efforts.

9. Does the phrase "information concerning [a BOC's] provision of exchange access" in section 272(e)(2) include CPNI as defined in section 222(f)(1)? Does the phrase "services ... concerning [a BOC's] provision of exchange access" in section 272(e)(2) include CPNI-related approval solicitation services? If such information or services are included, what must a BOC do to comply with the requirement in section 272(e)(2) that a BOC "shall not provide any...services...or information concerning its provision of exchange access to [its affiliate] unless such... services...or information are made available to other providers of interLATA services in that market on the same terms and conditions"?

Yes, section 272(e)(2) includes CPNI. CPNI is defined in part in sections 222(f)(1)(A) and (B) as "information that relates to the quantity, technical configuration, type, destination and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier..." and "information contained in the bills pertaining to telephone exchange service...." Thus, CPNI clearly is "information concerning [a BOC's] provision of exchange access."

However, section 272(e)(2) does not seem to encompass the CPNI approval solicitation service. (Such service would be covered under the "procurement of...information" nondiscrimination provision of section 272(c)(1).) Once approval for release to an affiliated or unaffiliated entity is obtained, Section 272(e)(2) does require that the BOC provide the CPNI to the unaffiliated entity at the same rates, terms and conditions as are available to the affiliate. Pursuant to section 272(e)(2), the BOC must reduce to writing any contract governing its provision of CPNI to its affiliate, make that written contract available for public

inspection, and make such contract available to any other provider of interLATA services in that market.

10. Does a BOC's seeking of customer approval to use, disclose, or permit access to CPNI for or on behalf of its section 272 affiliate constitute a "transaction" under section 272(b)(5)? If so, what steps, if any, must a BOC and its section 272 affiliate take to comply with the requirements of section 272(b)(5) for purposes of CPNI?

Yes, CPNI approval solicitation is a section 272(b)(5) transaction. Webster's *New Collegiate Dictionary* (150th Anniversary Edition, 1981) defines transaction as "an act, process, or instance of transacting; something transacted, especially a business deal." A BOC's attempt to secure CPNI disclosure authorization for its affiliate would seem to be the type of business deal which falls squarely within this definition.

To satisfy the requirements of section 272(b)(5), the contract governing the BOC's provision of CPNI approval solicitation service to its affiliate must be in writing, available for public inspection, and on an arm's length basis (*i.e.*, competitively neutral). Sprint suggests that the "public inspection" provision be met by having the contract posted electronically (for example, on the affiliate's or the BOC's Internet home page). Providing the information in this way ensures that interested parties are able to review the subject information without having to travel to an inconvenient BOC or BOC affiliate business office.

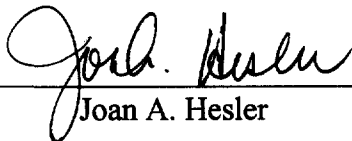
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Comments of Sprint Corporation** was Hand Delivered or sent by United States first-class mail, postage prepaid, on this the 17th day of March, 1997 to the below-listed parties:

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